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No. 97-1469

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CSX TRANSPORTATION, INC.,
Petitioner,

v.

KENNETH MCDANIEL,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Tennessee

REPLY BRIEF OF PETITIONER

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In his Brief in Opposition, respondent does not attempt to debunk the significance of petitioner's arguments in support of certiorari, but rather attempts to distract the Court from the importance of the issue by persuading the Court that it should not consider the case on the merits because of putative jurisdictional defects. None of respondent's assertions detracts from petitioner's central argument, however, *viz.*, because the admission of expert causation evidence is outcome determinative in FELA cases, the admissibility of such evidence should be governed by the controlling uniform federal standard, regardless of the forum—federal or state—in which the claim is brought. The resolution of this question is crucial to maintaining the uniformity of FELA jurisprudence that was the impetus for the FELA's creation, and that fundamental and recurring question of federal law is fairly presented by the circumstances here.

1. Respondent's principal contention is that the Tennessee Supreme Court's decision was not a final judgment. To be sure the case is interlocutory, but what respondent has failed to acknowledge, much less rebut, is that this Court, in certain circumstances, has departed from the strict finality requirement. In fact, "the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). In at least four categories of such cases, the Court has treated the decision on the federal issue as final and has exercised jurisdiction because "immediate rather than delayed" review is the best way to avoid waste and injustice. *Id.* at 477-78. Relevant to this case is the fourth category discussed in *Cox*: cases in which the federal issue has been finally decided with further proceedings pending in which petitioner "might prevail on the merits on nonfederal grounds . . . , and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* at 482-83.

The Tennessee Supreme Court has finally resolved the question of whether the admissibility of expert causation evidence in FELA cases brought in Tennessee courts is purely a question of state, not federal, law. Pet. App. 13a-17a. This holding will not be revisited by the Tennessee Supreme Court. As a result, 84 other cases (Pet. 2) pending in Tennessee, alleging toxic encephalopathy and seeking recovery under the FELA, will be subject to the Tennessee Supreme Court's ruling that Tennessee law governs this crucial, outcome-determinative question. All of those cases will be allowed to go forward whereas under the federal rule they would be dismissed. Pet. 10-11. "[T]he best way to avoid 'the mischief of economic waste and of delayed justice' " that would result from allowing the pending cases to be improperly decided based on the Tennessee

Supreme Court's ruling is for this Court to treat the Tennessee court's decision as final. See *Cox*, 420 U.S. at 478, quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945). This pivotal issue of the proper standard for the admissibility of expert evidence in FELA cases is squarely posed by CSXT's petition and should be decided by the Court now.

2. Similarly, respondent's contention that petitioner failed to raise in the proceedings below the question presented here fails to take into account the "elementary rule" that when the highest court in a state actually passes on a federal question, an irrebuttable presumption is created that the federal question was timely and properly raised. See *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979) (irrelevant to consider when federal question was raised in court below when it appears that question was, in fact, considered and decided); *Charleston Fed. Sav. & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185-86 (1945) (same). Respondent relies on several decisions of this Court for the proposition that the Court will not decide questions not raised in the proceedings below, Opp. 10, but respondent's recitation of that case law fails to include a full discussion. Those cases reveal that in certain circumstances the Court does not concern itself with how or when the question was raised in the state courts. As noted, in certain circumstances—specifically, where the highest state court has considered and passed on the issue—the Court assumes the federal question was properly raised below. *Orr*, 440 U.S. at 274-75. This presumption applies where the majority opinion "explicitly or impliedly recognize[s] the presence of a federal question and render[s] a decision thereon." Robert L. Stern et al., *Supreme Court Practice* 132 (7th ed. 1993).

The Tennessee Supreme Court has, necessarily, considered whether to apply the federal or state standard for the admission of expert causation evidence in FELA cases, the important issue at stake here, and concluded that the

state standard governed. The court's discussion of the admissibility of scientific evidence begins with a lengthy discussion of the federal standard—commencing with *Frye* and continuing through the revised standards set forth in *Daubert* and *Joiner*. See Pet. App. 10a-13a. The opinion then discusses the Tennessee standard, see Pet. App. 13a-17a, and ultimately concludes explicitly that the Tennessee Rules of Evidence provide the appropriate standard for determining the admissibility of expert causation evidence in FELA cases brought in Tennessee state courts. Pet. App. 18a-19a. It is that holding on which petitioner seeks certiorari.

* * * *

In sum, neither of respondent's arguments as to why the Court should decline to hear this case has merit. Furthermore, because of the obvious importance of the question before the Court to maintaining the uniformity of FELA jurisprudence and to preventing forum shopping by FELA litigants, respondent could not and did not argue that the question presented in the petition was in any way not worthy of review on the merits. Accordingly, certiorari should be granted to determine the proper standard to be used in FELA cases for assessing the admissibility of expert causation evidence.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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